



Ohio Contractors Association

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Robert C. Ashby
Deputy Assistant Counsel for Regulation and Enforcement
U.S. Department of Transportation
1200 New Jersey Avenue, SE
Washington, D.C. 20590-0001

RE: Docket No. OST-2009-0081 Overall Goal Schedule and Substitution
Docket No. OST-2009 Disadvantaged Business Enterprise Program Revisions

Dear Mr. Ashby:

Thank you for the opportunity to comment on potential revisions to the Department of Transportation's (DOT) Disadvantaged Business Enterprise (DBE) program. The Ohio Contractors Association (OCA) was established in 1918 and represents over 500 companies in the State of Ohio that provide heavy and highway construction services and other services in support of these construction activities. OCA's membership includes DBE firms and all of our construction members contract with DBE firms to attain goals that are prescribed by contract. Therefore, OCA's entire membership is directly impacted by the DBE program regulations. OCA provides the following comments on the April 8, 2009 advance notice of proposed rulemaking (ANPRM).

Three year Submittal of Goals

OCA would advocate that establishment of annual DBE goals be retained. The goal setting process is supposed to realistically assess the availability of disadvantaged businesses that are willing and able to perform contracts within this program. The market can shift dramatically in the three year time frame as being contemplated. The current financial situation is a reminder of just how volatile economic conditions can be. Locking in goal targets for a three year period undermines the ability to truly assess market conditions and DBE availability. OCA recommends that the goal setting process remain an annual exercise.

Counting Credit for Items Obtained by DBEs from Non-DBE Sources

DOT's current regulations allow states to count the portion of a construction contract performed by a DBE's own forces, including the cost of materials and supplies purchased and equipment leased by the DBE for work on the contract, except if the purchases and/or leases are from the prime contractor or its affiliates. OCA believes that, on many occasions, this provision inhibits a DBE's success in the competitive bid environment and is therefore counter to the program's intent.

Having reviewed the four options proposed in the ANPRM, OCA strongly recommends that DOT adopt option number 3. Option 3 permits items obtained by DBEs to be counted regardless of the source. It does not make sense in the context of the DBE program's intent to limit the sources of materials that DBEs are permitted to use and still be counted as long as the activities of the DBE can be directly tied to materials being purchased by that DBE. Option 3 allows the market place to operate in a normal fashion. DBEs are not prevented from participating on contracts simply because the only source of a necessary material is the prime contractor.

The impact of the rule as currently stated goes further in creating a competitive disadvantage between prime contractors when considering subcontracting items of work to DBE firms. In paving work, the cost of material is a significant percentage of the overall cost of the project. A prime contractor that owns a material source convenient to the project could be at a disadvantage in meeting DBE goal requirements because material purchased from the prime could not be counted by that prime but it could be counted by a competitor. Option 3 would provide a level playing field for DBEs and allow them to participate more freely in the market. Option 3 should be adopted.

Contract Unbundling

DOT seeks comment on the practice of contract bundling by DOTs and whether a requirement to unbundle projects will assist disadvantaged businesses. Bundling various projects together can be beneficial from a DOT's perspective because it can often lead to efficiencies that can lower the cost of construction. It can also be beneficial to motorists in that traffic staging can be better coordinated which will hopefully have a positive impact on congestion and safety. On the other hand, bundled contracts can result in large projects that are outside of a small firm's bonding capacity thereby precluding them from bidding on those contracts. Unbundling contracts may result in lower costs on contracts because smaller sized projects can encourage more competition and thereby lower prices. However, even where projects are unbundled, this may not benefit DBE subcontractors if they do not have the capacity or experience to bid on these contracts.

OCA recommends that the DBE regulations encourage, but not mandate, contract unbundling where there is no impact on traffic congestion, safety or costs. DOTs should be encouraged, in particular, to bid discrete elements of larger projects as separate contracts if there is no negative impact on overall project completion and there is less than a minimal differential in the cost. On competitively bid contracts, the decision about how DBE contract goals are to be met must be left with the contractor. OCA suggests that DOTs be encouraged to include monetary incentives in solicitations where goal requirements are exceeded as a way to encourage contractors to provide meaningful work to DBE firms.

Revised DBE Certification Application and Personal Net Worth Statement

We have no comment to provide on this topic.



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Facilitating Interstate Certification

OCA strongly supports the use of the unified certification program (UCP) to ease the certification burden on DBE contractors that work in more than one state and also to facilitate prime contractors in identifying certified DBEs to perform subcontract work. The process needs to be simplified. States should be required to accept other state's certifications except in instances where they have a specific concern about the certification of an individual DBE. States should be required to accept the certification determination of another state. In the case where there is a question, the certification should be accepted until a finding is made that would negate that certification.

Termination for Convenience and Substitution

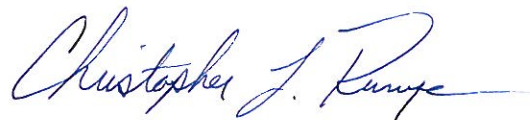
DOT seeks comment on whether it should modify the regulations to involve state DOTs in situations where the prime contractor determines that it is not in the best interest of successful contract completion for the contractor to use a DBE subcontractor identified early on as a likely participant on a project. Where the prime contractor has met the DBE contract goal and the decision to use a different subcontractor does not impact goal achievement, DOT should have no say in the matter. OCA suggests that this is a determination that should be made exclusively by the contractor, who is ultimately responsible for contract completion, and not the state DOT. In the example DOT gives, it has mischaracterized contract termination. While a subcontractor may be identified early on as a likely participant on a project, it is not until the terms of a subcontract are agreed to and an agreement is signed that a contract exists.

If the circumstances are different and a subcontract has been signed the prime should retain the authority to terminate a subcontractor for cause, meaning it is not complying with contract requirements. Termination for convenience does not apply in this circumstance. OCA believes there is a misunderstanding about these terms and their application and that this topic should be the subject of future stakeholder discussions before a determination on a rule modification is warranted.

DOT also raises the issue of DBE involvement on change orders as part of this discussion. OCA believes that this topic should also be discussed further in stakeholder meetings prior to issuing rules.

Thank you for providing OCA this opportunity to comment.

Sincerely,



Christopher L. Runyan, P.E.
President

